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APPENDIX A

[PUBLISH]
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In the United States Court of Appeals
For the Eleventh Circuit

No. 22-14234

A.W. BY AND THROUGH J.W.,
E.M. BY AND THROUGH B.M.,
M.F. BY AND THROUGH J.C.,
D.G. BY AND THROUGH D.G.,
Plaintiffs-Appellants,

versus

COWETA COUNTY SCHOOL DISTRICT,
CHRISTI HILDEBRAND,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 3:21-cv-00218-TCB

Before WILLIAM PRYOR, Chief Judge, and JILL PRYOR and BRASHER, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

This appeal requires us to decide whether Title II of the Americans with Disabilities Act allows the

recovery of damages for emotional distress, *see* 42 U.S.C. § 12133, and whether several special education students alleged a constitutional violation against a principal and school district. The students alleged that the principal and school district violated Title II when the students' teacher physically and emotionally abused them. They also alleged that the principal's deliberate indifference violated their constitutional right to due process. The district court dismissed the students' complaint. It correctly ruled that emotional distress damages are not recoverable under Title II, but it erred when it failed to consider whether the students might be entitled to other relief. It also correctly ruled that the students failed to state a constitutional violation against the principal and the school district. We affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

We draw all facts from the students' proposed amended complaint. The Coweta County School District operates Elm Street Elementary School in Coweta County, Georgia. The school district is a public entity under the Americans with Disabilities Act, *see id.* § 12131(1). Dr. Christi Hildebrand served as the principal of Elm Street in fall 2019. A.W., E.M., M.F., and D.G. attended Elm Street as students in fall 2019 and were assigned to the same special education classroom. The students have disabilities that affect their ability to communicate to varying degrees.

A.W. was 12 years old in fall 2019. He has several disabilities, including developmental delays

that affect his cognitive abilities and language skills. He is "verbal but non-communicative." He also has Dravet Syndrome, a rare and severe kind of epilepsy that is difficult to control.

E.M. was 11 years old in fall 2019. He has autism and suffers from social delay and learning disabilities. He is verbal, but he has limited social understanding and a limited ability to communicate. In 2022, E.M. was an eighth-grade student with the cognitive ability of a second grader.

M.F. was 10 years old in fall 2019. She has Down Syndrome and autism. She also has a heart condition and is legally blind. She is verbal but has limited communication skills.

D.G. was seven years old in fall 2019. She is "fairly verbal" but needs special education and was awaiting a formal diagnosis when this suit was filed. D.G.'s mother described her as "a slow learner."

Hildebrand hired Catherine Sprague to teach the students in fall 2019. Sprague had never served as a lead teacher and had never been responsible for a classroom of students with moderate to significant disabilities. Sprague also did not have a special-education certification. The Georgia Professional Standards Commission required Sprague to pursue additional instruction and training to remain in her position.

Throughout fall 2019, the students' parents saw signs that their children had become frightened by

school and that Sprague was not managing the classroom well. For example, A.W. resisted going to school and started acting "mean and defiant" in ways that were out of character. He frequently came home from school with clothing "soaked in urine or soiled with feces." Similarly, M.F. became "increasingly unhappy" with school and said for the first time that she "did not want to be there." M.F. also came home with her clothes "often soaked with urine or soiled with feces." She returned home one day with marks around her neck. She stated that she had been "choked" by one of her classmates, but her parents were never notified about an incident. D.G. told her mother that she was spanked at school and that Sprague had locked her in the bathroom for "time out." D.G. explained that Sprague placed her foot on the door so that D.G. was trapped inside. On one occasion, D.G.'s mother visited D.G. at school and observed a paraprofessional "holding down D.G. with a very angry look on her face." E.M.'s mother believes that E.M. did not tell her about Sprague's conduct because he feared that his mother would remove him from the class and that he would be unable to see his friends. At least one parent contacted Hildebrand during the fall to express concerns about the classroom environment.

Nicole Marshall, a paraprofessional assigned to work with Sprague, observed problems in the classroom. On October 2, 2019, Marshall saw Sprague "slap" M.B., a student not party to this action. When M.B. cried, Sprague called her "ridiculous" and a "bully." On December 5, 2019, Marshall saw Sprague place her hands around M.B.'s neck and move her head "back and forth aggressively." On a different

occasion, when M.B. had an accident, Marshall saw Sprague call her "a disgusting animal and a baby who will never have friends." On December 6, 2019, Marshall saw Sprague grab D.G.'s shoe and throw it at M.F., striking M.F. in the face. On December 13, 2019, Marshall saw Sprague "threaten[] to punch an autistic student." On December 16, 2019, Marshall saw Sprague "pinch [a student's] inner forearm." Marshall reported Sprague's conduct to Hildebrand on December 6, 10, 11, 12, and 16, 2019.

State law requires school administrators with reasonable cause to suspect that child abuse has occurred to report the suspected abuse to authorities "immediately, but in no case later than 24 hours from the time there is reasonable cause to believe that suspected child abuse has occurred." GA. CODE § 19-7-5(c)(1)(I), (e)(2). Hildebrand contacted law enforcement about Marshall's allegations on December 18, 2019. School officials also notified the students' parents about the reports on December 18, 2019. In January 2020, the district superintendent acknowledged that Hildebrand failed to report the abuse allegations as promptly as state law required. Hildebrand was suspended for two days without pay and was required to undergo training about the reporting requirements.

The students sued the school district and Hildebrand. Their complaint alleged violations of the students' right to due process, *see* 42 U.S.C. § 1983; violations of Title II of the Americans with Disabilities Act, *see id.* § 12132; violations of section 504 of the Rehabilitation Act, *see* 29 U.S.C. § 794; and negligence,

see GA. CODE § 19-7-5. The students sought "damages for mental anguish and pain and suffering" and special damages for the federal claims, as well as punitive damages from Hildebrand under section 1983.

A few months after the students sued, the Supreme Court held in *Cummings v. Premier Rehab Keller, P.L.L.C.*, that emotional distress damages are not recoverable under section 504 of the Rehabilitation Act. 142 S. Ct. 1562, 1576 (2022). The school district and Hildebrand then moved to dismiss the students' complaint for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). They argued that because Title II incorporates the damages and other remedies provision of the Rehabilitation Act, *Cummings* foreclosed recovery of emotional distress damages under Title II. They also argued that the complaint failed to state a constitutional violation by either defendant and that Hildebrand enjoys qualified immunity.

After obtaining an extension to file a response, the students moved for leave to amend their complaint and attached a proposed amended complaint. The students argued that the proposed amended complaint cured any previous defects. They acknowledged that *Cummings* foreclosed recovery under the Rehabilitation Act but argued that the decision did not foreclose damages for emotional distress under Title II. They also argued that the amended complaint alleged a violation of the right to substantive due process against the school district and Hildebrand and that Hildebrand is not entitled to qualified immunity.

The district court dismissed the students' complaint and denied the motion to amend as futile. It ruled that after *Cummings* the students could not recover damages for emotional distress under Title II because Title II expressly incorporates the remedies of the Rehabilitation Act. It also ruled that the students had failed to state a constitutional claim against Hildebrand and alternatively that she was entitled to qualified immunity. It dismissed the constitutional claim against the school district. And it declined to exercise supplemental jurisdiction over the negligence claim.

II. STANDARD OF REVIEW

We review *de novo* a dismissal for failure to state a claim, accept the allegations in the complaint as true, and construe them in the light most favorable to the plaintiff. *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016).

III. DISCUSSION

We divide our discussion into two parts. First, we explain that, although damages for emotional distress are unavailable under Title II, the district court erred when it dismissed the students' claim without considering whether they might be entitled to other relief. Second, we explain that the students failed to allege constitutional claims against Hildebrand and the school district.

A. Title II Does Not Allow Damages for Emotional Distress, But the District Court Erred by Failing to Consider Whether the Students Could Seek Other Relief.

The students argue that the district court erred when it ruled that damages for emotional distress are unavailable under Title II. Although the students acknowledge that *Cummings* held that emotional distress damages are unavailable under the Rehabilitation Act, they argue that the rationale of *Cummings* does not extend to Title II because Congress enacted Title II under Section Five of the Fourteenth Amendment, not the Spending Clause. But precedent forecloses that argument. Yet the district court erred when it failed to consider whether the students could seek other kinds of relief.

Title II expressly incorporates the remedies of the Rehabilitation Act: the "remedies, procedures, and rights set forth in" the Rehabilitation Act, 29 U.S.C. § 794a, are the "remedies, procedures, and rights" that Title II "provides to any person alleging discrimination on the basis of disability in violation of section 12132," 42 U.S.C. § 12133. The Rehabilitation Act, in turn, incorporates the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(a)(2). So the remedies available under Title VI are the same remedies available under the Rehabilitation Act and Title II.

Damages for emotional distress are not recoverable under Title II. Because *Cummings* held that "emotional distress damages are not recoverable"

under the Rehabilitation Act, 142 S. Ct. at 1576, it follows that emotional distress damages are not recoverable under Title II, which provides the same "remedies, procedures, and rights" as the Rehabilitation Act*, see* 42 U.S.C. § 12133.

That Congress enacted Title II under Section Five of the Fourteenth Amendment does not matter. The students argue that *Cummings* does not limit the remedies available under Title II because it is not a Spending Clause statute. But the Supreme Court rejected that kind of reasoning in *Barnes v. Gorman*. *See* 536 U.S. 181, 189 n.3 (2002) That is, it rejected the argument that although punitive damages are unavailable under Title VI, they remain available under the Americans with Disabilities Act because it was not enacted under the Spending Clause. *Id.* The Court explained that the Americans with Disabilities Act "could not be clearer" that its remedies "are the same" as those of the "Rehabilitation Act, which *is* Spending Clause legislation." *Id*. And the incorporation of those remedies "make[s] discussion of the [Americans with Disabilities Act]'s status as a 'non Spending Clause' tort statute quite irrelevant." *Id.*; *see also Doherty v. Bice*, 101 F.4th 169, 174–75 (2d Cir. 2024).

Barnes requires us to read the remedies available under Title II of the Americans with Disabilities Act as mirroring the remedies under Title VI of the Civil Rights Act of 1964. *See Ingram v. Kubik*, 30 F.4th 1241, 1259 (11th Cir. 2022). In *Ingram*, the plaintiff sought to hold the defendant vicariously liable under Title II for discrimination against disabled

people in his department. *Id.* at 1257. We held that vicarious liability did not apply under Title II because "vicarious liability is unavailable under Title VI." *Id.* at 1258. The plaintiff argued that the unavailability of vicarious liability under Title VI did not control because Congress did not enact Title II under the Spending Clause. *Id.* at 1259. We ruled that *Barnes* "foreclosed" that argument. *Id.* So we must reject that argument here too.

The students argue, in the alternative, that the district court erred when it dismissed their Title II claim even if they cannot recover damages for emotional distress. The students contend that they should be allowed to seek other kinds of relief under Title II, including damages for physical harm, compensation for lost educational benefits, remediation, and nominal damages. We agree.

Requesting an improper remedy is not fatal to a claim. A complaint is sufficient if it alleges facts that establish that the plaintiff is entitled to any relief that the court can grant. *Hawkins v. Frick-Reid Supply Corp.*, 154 F.2d 88, 89 (5th Cir. 1946). That a plaintiff might misconceive his remedy does not warrant dismissal of the complaint unless he is entitled to "'no relief under any state of facts.'" *Kent v. Walter E. Heller & Co.*, 349 F.2d 480, 481 (5th Cir. 1965) (citation omitted). For example, in *Levine v. World Financial Network National Bank*, the district court dismissed a complaint because it sought damages for emotional distress. 437 F.3d 1118, 1120 (11th Cir. 2006). We reversed and explained that the complaint "stated a *prima facie* claim" and requested "all other

relief that the Court deems just and appropriate"—a demand that encompassed other damages available under the governing statute. *Id.* at 1123– 25 (citation and internal quotation marks omitted).

Although these precedents pre-date *Bell Atlantic Corp. v. Twombly*, that decision did not disturb the rule that requesting an improper remedy is not fatal to a claim. *See* 550 U.S. 544, 555–56 (2007). *Twombly* replaced the "no set of facts" standard with the requirement that complaints must state "plausible" claims. *Id.* at 556, 561 (internal quotation marks omitted). But *Twombly* did not change the rule that a district court must consider whether a complaint that seeks an improper remedy might warrant another form of relief.

The Federal Rules of Civil Procedure confirm as much. Rule 54(c) states that a district court must "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," when it enters any final judgment except a default judgment. FED. R. CIV. P. 54(c). As our sister circuit explained after *Twombly*, "'the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type.'" *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp.*, 635 F.3d 1106, 1108 (8th Cir. 2011) (quoting 5 Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. § 1255, at 508–09 (3d ed. 2004)).

The district court should have considered

whether the students might be entitled to other relief. The students' complaint requested that the district court grant "other and further relief" as it "deems just and proper." The failure to consider that request was error. Although the parties dispute the availability of other relief, those arguments are better suited for the district court to consider first.

B. The District Court Correctly Ruled that the Students Failed to State Section 1983 Claims Against Hildebrand and the School District.

The students also argue that the district court erred when it dismissed their claims under section 1983 against Hildebrand and the school district. To state a claim under section 1983, the students must allege that an act or omission, committed by a person acting under color of state law, deprived them of a right, privilege, or immunity secured by the Constitution or a federal statute. *See* 42 U.S.C. § 1983. At this stage, the claim need only be "plausible on its face." *Twombly*, 550 U.S. at 570. A claim is plausible when it "permit[s] the reasonable inference" that the state actor "is liable for the misconduct alleged." *Hoefling v. City of Miami*, 811 F.3d 1271, 1281 (11th Cir. 2016) (citation and internal quotation marks omitted).

The students allege that Hildebrand and the school district violated their right to due process of law. The Due Process Clause of the Fourteenth Amendment bars state officials from depriving "any person of life, liberty, or property, without due process of law." Although the text of the clause mentions only

the process that must accompany a deprivation of certain rights, the Supreme Court has recognized a substantive component to this constitutional guarantee. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022). The students allege that Hildebrand was deliberately indifferent to Sprague's misconduct.

There are two plausible ways to understand the students' theory of liability. One theory considers Hildebrand liable as Sprague's supervisor because she was deliberately indifferent to Sprague's misconduct. The other considers Hildebrand independently liable based on her deliberate indifference to the misconduct. We need not decide which theory the students advance because both fail as a matter of law.

Both theories would require the students to prove that Sprague violated their right to substantive due process. A supervisor is liable for a subordinate's constitutional violation only if she "personally participates in the alleged unconstitutional conduct" or causes the constitutional violation. *Christmas v. Harris County*, 51 F.4th 1348, 1355 (11th Cir. 2022) (citation and internal quotation marks omitted). That is, Hildebrand is liable as Sprague's supervisor only if she participated in violating the students' rights or caused them to suffer a violation at the hands of Sprague. Students are in a noncustodial relationship with the state. *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1329 (11th Cir. 2020). In that setting, "conduct by a government actor" violates substantive due process "only if the act can be characterized as arbitrary or conscience shocking in a constitutional

sense." *Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305 (11th Cir. 2003). So Hildebrand's liability as a supervisor turns on whether she participated in or caused conscience- shocking conduct, and her independent liability turns on whether her alleged deliberate indifference to the alleged abuse shocks the conscience. We have never held that an official's deliberate indifference in a noncustodial setting can shock the conscience. *Hernandez*, 982 F.3d at 1331. Indeed, even allegations of intentional misconduct seldom shock the conscience. *Nix v. Franklin Cnty. Sch. Dist.*, 311 F.3d 1373, 1378 (11th Cir. 2002).

Our precedent makes clear that Sprague's alleged abuse did not violate the students' right to substantive due process. We have held that a similar complaint that a teacher abused a disabled student did not shock the conscience. *See T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 598–603 (11th Cir. 2010). In *T.W.*, a special education teacher engaged in excessive corporal punishment and verbal abuse and physically abused a student without any disciplinary purpose. *Id.* at 598–99. The corporal punishment included twisting the student's arms behind his back, pinning him against things with her body, and even tackling him to the ground. *Id.* at 595–96. The teacher also tripped the student with her foot after releasing him from timeout. *Id.* at 596. That act served no disciplinary purpose. *Id.* at 599. We ruled that the shock-the-conscience standard governed the teacher's conduct. *See id.* at 598–99. And the lack of any serious bodily injury weighed against holding that the abuse violated that standard. *See id.* at 595–96, 599, 601. None of the allegations established

a violation where the student suffered at most "transient pain." *Id.* at 599, 601.

In the light of *T.W.*, Sprague's alleged abuse does not satisfy the shock-the-conscience standard. "Only the most egregious official conduct" shocks the conscience. *Hernandez*, 982 F.3d at 1330 (citation and internal quotation marks omitted). Although the students' complaint contains several allegations of abuse, only two allegations involved a party: Sprague allegedly struck M.F. in the face with a shoe causing her to cry, and Sprague allegedly spanked D.G. and locked her in the bathroom for timeout. Although troubling, these acts do not satisfy the shock-the-conscience standard. The complaint does not allege that any student suffered "anything more than transient pain." *See T.W.*, 610 F.3d at 601.

The Supreme Court has cautioned against judicial expansion of rights to substantive due process "because guideposts for responsible decisionmaking in this unchartered area are scarce and openended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). We "take seriously" those warnings, *Waddell*, 329 F.3d at 1304, especially when asked to expand substantive due process "into areas of conventional tort law," *Nix*, 311 F.3d at 1376. Allegations of a teacher's intentional abuse are ordinarily the province of state tort law. *See Lawson v. Bloodsworth*, 722 S.E.2d 358, 359–60 (Ga. Ct. App. 2012) (reversing summary judgment for teacher on student's battery claim because the record reflected that the teacher might have intentionally thrown a chair at the student). Sprague's alleged abuse does not warrant

supplanting state tort law and exceeding the limited contours of the shock-the-conscience standard.

Because Sprague's alleged abuse did not violate the students' constitutional rights, Hildebrand and the school district also did not violate them. Hildebrand did not participate in or cause a constitutional violation as Sprague's supervisor. *See Christmas*, 51 F.4th at 1355. Hildebrand's alleged deliberate indifference also cannot independently shock the conscience when Sprague's alleged abuse fails to satisfy that standard. And the students' failure to allege that Sprague or Hildebrand violated their constitutional rights defeats their claim against the school district. To state a claim against the school district under section 1983, the students must allege that a policy or custom of the district caused a constitutional violation. *See Bd. of Cnty. Cmm'rs v. Brown*, 520 U.S. 397, 403 (1997) (citing *Monell v. Department of Soc. Services*, 436 U.S. 658, 694 (1978)). Without an underlying constitutional violation, we need not consider whether the school district had a policy or custom that caused one.

IV. CONCLUSION

We **AFFIRM** the dismissal of the section 1983 claims, **VACATE** the dismissal of the Title II claim, and **REMAND** with instructions for the district court to consider in the first instance whether the students may be entitled to any relief under Title II.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
NEWNAN DIVISION

A.W. by and through J.W.;
E.M. by and through B.M;
M.F. by and through J.C.; and
D.G. by and through D.G.,
Plaintiffs,

v.

COWETA COUNTY SCHOOL
DISTRICT and CHRISTI HILDEBRAND,
Defendants.

CIVIL ACTION FILE
NO. 3:21-cv-218-TCB

O R D E R

I. Background

Plaintiffs, former students of Elm Street Elementary School (within the Coweta County School System), have sued Defendants Coweta County School District and school principal Christi Hildebrand based on alleged abuse that the students' former teacher, Cathy Sprague, inflicted upon them. They assert that Sprague abused them physically and emotionally

during the school day; that paraprofessional Nicole Marshall reported the abuse to Hildebrand; and that Hildebrand failed to report it to the appropriate authorities within twenty-four hours of receiving the report.

Plaintiffs assert the following claims in their original complaint: (1) violation of the Fourteenth Amendment through 42 U.S.C. § 1983 (against both Defendants); (2) violation of Title II of the Americans with Disabilities Act ("ADA") (against the school district); (3) violation of Section 504 of the Rehabilitation Act (against the school district); and (4) negligence under Georgia law (against Hildebrand).

Defendants have filed a motion [17] to dismiss. They contend that the claim under § 1983 fails because it does not assert an actionable constitutional violation, state the type of violation Plaintiffs attempt to assert, allege a basis for liability against the school district, or allege that Hildebrand's actions violated a clearly established right.

Defendants also contend that Plaintiffs' claims under the ADA and the Rehabilitation Act seek damages that are not available under these statutes and fail to provide factual support to show that the alleged abuse or failure to report occurred because of Plaintiffs' disabilities. And Defendants contend that a negligence claim cannot be based upon an alleged failure to report within the provided time and that Hildebrand is entitled to official immunity from such a claim.

Plaintiffs have filed both a response in opposition to Defendants' motion to dismiss and a motion [18] for leave to amend their complaint.[1] The bulk of Plaintiffs' response to the motion to dismiss relates to their proposed amended complaint. In fact, Plaintiffs do not meaningfully respond to Defendants' motion to dismiss their currently governing complaint. For the reasons discussed in Defendants' brief in support of their motion and in *infra* in the context of the motion to amend,[2] Defendants' motion to dismiss the federal claims is meritorious.

The bulk of this Order deals with the proposed amended complaint. Defendants contend that the motion for leave to amend should be denied as futile because the proposed amended complaint still fails to state a claim for which relief can be granted. Although the Court is sympathetic to Plaintiffs' plight, for the reasons discussed, the Court agrees. Therefore, the motion for leave to amend those claims must be denied. The Court will decline to exercise supplemental jurisdiction over the state-law negligence claim.

II. Legal Standard

Leave to amend should be "freely given when

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[1] The proposed amended complaint does not contain a claim under the Rehabilitation Act.

[2] With respect to Plaintiffs' federal claims, for the same reasons the Court finds the proposed amended claims frivolous, the Court will dismiss the original claims.

justice so requires." FED. R. CIV. P. 15. This "mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court . . . ." *Id*. That said, "[a] district court's discretion to dismiss a complaint without leave to amend 'is severely restricted' by Fed. R. Civ. P. 15(a) . . . ." *Thomas v. Davie*, 847 F.2d 771, 773 (11th Cir. 1988) (citing *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (Former 5th Cir. 1981)).

"Even so, granting leave to amend is not automatic." *Grant v. Countrywide Home Loans, Inc.*, No. 1:08-cv-1547-RWS, 2009 WL 1437566, at *21 (N.D. Ga. May 20, 2009). The Court "need not . . . allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

"Denial of leave to amend is justified by futility when the 'complaint as amended is still subject to dismissal.'" *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999) (citing *Halliburton & Assocs., Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 444 (11th Cir. 1985)). When a claim, as amended, is "insufficient as a matter of law," a motion for leave to amend can be properly denied as futile. *Id*. The test to determine the futility of an amended complaint is the same as that applied under Rule 12(b)(6) of the Federal Rules of Civil Procedure governing dismissal

for failure to state a claim. *See Christman v. Walsh*, 416 F. App'x 841, 844 (11th Cir. 2011) ("A district court may deny leave to amend a complaint if it concludes that the proposed amendment would be futile, meaning that the amended complaint would not survive a motion to dismiss."); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520–21 (11th Cir. 1996) (upholding denial of leave to amend as futile where the amended claim "could not withstand a motion to dismiss").

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

To survive a 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility

> standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

III. Discussion

A. ADA Claim

Defendants contend that Plaintiffs' ADA claim in their proposed amended complaint is futile because it—like the claim in the original complaint—seeks relief the statute does not authorize. Specifically, Plaintiffs seek damages for emotional distress under the ADA.

The ADA's remedies provision incorporates the related provision from the Rehabilitation Act, 42 U.S.C. § 12133, and the Supreme Court has held that the Rehabilitation Act does not provide recovery for damages for emotional distress. *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1571–72 (2022).

Other courts have held that ADA claims seeking emotional distress damages under the ADA are subject to dismissal because of *Cummings*. *See, e.g.*, *J.P. v. Nebraska*, No. 4:22-cv-3095, 2022 WL 5254121, at *6 (D. Neb. Oct. 6, 2022) ("Although the Supreme Court did not directly address § 202 of the ADA in *Cummings*, its holding implicitly found that emotional distress damages are unavailable under that section.") (citing *Barnes v. Gorman*, 536 U.S. 181, 185 (2002)); *M.D. v. Nebraska*, No. 4:21-cv-3315, 2022 WL 4540390, at *1 (D. Neb. Sept. 28, 2022) ("Because the Rehabilitation Act does not allow [emotional distress] damages, neither does the ADA."); *Hill v. SRS Distribution Inc.*, No. CIV 21-370-TUC-CKJ, 2022 WL 3099649, at *5 (D. Ariz. Aug. 4, 2022) (noting that "the Supreme Court recently held that damages for

emotional distress are not recoverable under the Rehabilitation Act; it is therefore unlikely such damages are available under the ADA" (citing *Cummings*, 142 S. Ct. at 1576)); *Faller v. Two Bridges Reg'l Jail*, No. 2:21-cv-63-GZS, 2022 WL 3017337, at *4 (D. Me. July 29, 2022) ("It is likely that this limitation on compensatory damages [set forth in *Cummings*] extends to Plaintiff's ADA claim as well."); *Wolfe v. City of Portland*, No. 3:20-cv-1882-SI, 2022 WL 2105979, at *6 (D. Or. June 10, 2022) ("A recent decision by the Supreme Court forecloses emotional distress damages under the Rehabilitation Act and thus likely also under the ADA, for which remedies are construed coextensively with the Rehabilitation Act." (citing *Cummings*, 142 S. Ct. 1562)). Plaintiffs have not pointed to, nor is the Court aware of, a case post-*Cummings* reaching a different conclusion.

Plaintiffs point to 42 U.S.C. §§ 2000e-5(e)(3) & 1981a; however, those statutes apply only to claims of employment discrimination. Moreover, the cases on which they rely pre-date *Cummings*.

Additionally, *Cummings*, 142 S. Ct. at 1571, held that the scope of damages under the Rehabilitation Act is limited to what is traditionally available for breach-of-contract actions. Thus, because Georgia law does not allow for damages for pain and suffering in breach of contract actions, such damages are likewise unavailable here. *See, e.g.*, *Seok Hwi Cha v. Kani House Japanese Rest.*, No. 1:16-cv-485-SCJ, 2017 WL 11616366, at *2 (N.D. Ga. Oct. 16, 2017) (citing O.C.G.A. § 13-6-1).

The motion to dismiss will therefore be granted and the motion to amend denied as to Plaintiffs' ADA claim. The motion to dismiss similarly will be granted as to the Rehabilitation Act claim contained in the original complaint.

B. Substantive Due Process under § 1983

Section 1983 creates no substantive rights.[3] *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Rather, it provides a vehicle through which individuals may seek redress when their federally protected rights have been violated by someone acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

To state a claim for relief under § 1983, plaintiffs must show two elements. First, they must allege that an act or omission deprived them of a right, privilege, or immunity secured by the U.S. Constitution. *Hale v. Tallapoosa Cnty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). Second, they must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id.*

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[3] As Defendants point out, although the proposed amended complaint refers to the procedural component of the Fourteenth Amendment, it makes no factual allegations regarding processes or procedures that were due. Thus, the Court does not construe the amended complaint as attempting to allege a procedural due process claim.

1. Hildebrand

Defendants contend that Plaintiffs fail to allege a constitutional violation. The Eleventh Circuit has stated that deliberate indifference does not constitute a due process violation in a non-custodial setting such as a public school. *Nix v. Franklin Cnty. Sch. Dist.*, 311 F.3d 1373, 1377 (11th Cir. 2002). And Plaintiffs' allegations do not exceed deliberate indifference; they do not allege, for instance, direction or intent to injure or mistreat Plaintiffs.

Plaintiffs point to a case in which the Eleventh Circuit stated that "deliberate indifference might be sufficient in a non-custodial setting if, 'at the very least,' it involved 'deliberate indifference to an extremely great risk of serious injury.'" *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1330 (11th Cir. 2020) (quoting *Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1306)). However, the court in that opinion expressed "doubt that deliberate indifference can ever be 'arbitrary' or 'conscience shocking' in a non-custodial setting." *Id.* The court further clarified that no case in the Supreme Court or the Eleventh Circuit had found deliberate indifference to suffice in such a context and stated that the "weight of authority" lies with *Nix* in standing for the proposition that deliberate indifference cannot suffice. *Id.* at 1330–31. Thus, the Court finds it highly unlikely that deliberate indifference would—in any circumstances—form a successful basis for a claim against Hildebrand.

Nonetheless, for deliberate indifference to even

potentially suffice, it must involve—to reiterate—an extremely great risk of serious injury. And the indifference must be arbitrary or conscience-shocking. *Id.* at 1330. Here, the allegations are that Sprague placed one Plaintiff in time out in the bathroom and threw a student's shoe at another Plaintiff, striking that student in the face. This behavior is deeply concerning to the Court. However, the alleged delay in reporting it does not rise to the level of the sort of behavior the Eleventh Circuit has held to shock the conscience. Indeed, the Eleventh Circuit has held that due process violations did not result from behavior more egregious than that alleged in the instant case. *See, e.g.*, *Peterson v. Baker*, 504 F.3d 1331, 1337 (11th Cir. 2007) (holding that a plaintiff did not state a claim for a due process violation where the teacher grabbed the student by the neck and squeezed, causing the student to have difficulty breathing); *Dacosta v. Nwachukwa*, 304 F.3d 1045, 1047–49 (11th Cir. 2002) (holding no substantive due process claim existed when college instructor slammed a door in a student's face, causing her arm to become lodged in the shattered glass pane, violently swung door and shoved student's face in attempt to dislodge her arm, causing student to incur over $5000 in medical expenses).

By contrast, the case to which Plaintiffs point as involving the type of allegations that are determined to be conscience-shocking involved an eight-year-old student with disabilities whose classmates beat him severely and frequently, leading to permanent injury to his testicles—ultimately resulting in surgery to remove the permanently damaged testicle and to repair the viable one. *Doe v. Huntsville City Sch. Bd.*

of Educ., 546 F. Supp. 3d 1043, 1050 (N.D. Ala. 2021). To be clear, the alleged actions by Sprague in this case are horrific and heartbreaking. But there are no allegations of permanent damage requiring surgical intervention such as in *Doe*.

The Court thus determines that Plaintiffs have failed to plead an actionable constitutional violation against Hildebrand. Thus, Defendants' motion to dismiss will be granted and Plaintiffs' motion to amend will be denied as to the substantive due process claim against her.

Even if Plaintiffs had pleaded a constitutional violation, Hildebrand would be entitled to qualified immunity. "Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherrod v. Johnson*, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Supervisory liability under § 1983 requires either personal participation or a causal connection between the supervising official's acts and the alleged deprivation. *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999). Plaintiffs contend that they have pleaded a causal connection, which can be established by a history of widespread abuse that puts a responsible supervisor on notice of the need to correct the alleged deprivation, yet the supervisor fails to do so. *Id.* "The deprivations that constitute widespread

abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences." *Id.*

Whether acts fall within the scope of a person's discretionary authority depends on whether she was performing a legitimate job-related function through means within her power to utilize. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004). The actions allegedly performed by Hildebrand are recommending hiring Sprague despite Sprague's inexperience and delaying in responding to Marshall's reports of alleged abuse. The Court agrees that these fall within the scope of Hildebrand's discretionary authority.

The Court next turns to the question of whether Hildebrand's alleged actions violated a clearly established right. Ordinarily, for a right to be clearly established, case law must "have been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what she is doing violates federal law." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). For qualified immunity purposes, only decisions of the Supreme Court, Eleventh Circuit Court of Appeals, or the Georgia Supreme Court can make a right clearly established. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 n.4 (11th Cir. 1997).

Yet, as Defendants point out, a year after the acts alleged in this case, the Eleventh Circuit noted that no case in the Supreme Court or the Eleventh

Circuit itself had found deliberate indifference to suffice to state a claim of violation of substantive due process rights in a non-custodial context. *L.S.*, 982 F.3d at 1331. And the parties have pointed to no Georgia Supreme Court decision making such a holding, and the Court is aware of none.

Thus, the Court finds that even if Plaintiffs had pleaded a constitutional violation by Hildebrand, she would be entitled to qualified immunity. The original claim is subject to dismissal—and the amended claim futile—for this additional reason.

2. School System

A school system cannot be held vicariously liable under § 1983 for the conduct of its employees unless the plaintiff can show a "municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997) (quoting *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978)). "The plaintiff[s] must also demonstrate that, through its *deliberate* conduct, the [school system] was the 'moving force' behind the injury alleged." *Id.* at 404.

Plaintiffs can establish a constitutional deprivation under § 1983 by identifying either "(1) an officially promulgated [school system] policy, or (2) an unofficial custom or practice of the [school system] shown through the repeated acts of a final policymaker for the [school system]." *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (citing *Monell*, 436 U.S. at 690–91); *see also Mandel v. Doe*, 888 F.2d 783,

793 (11th Cir. 1989) ("Under this theory of municipal liability, the first step of the inquiry is to identify those individuals whose decisions represent the official policy of the local governmental unit."). "This 'official policy' requirement [is] intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Grech*, 335 F.3d at 1329 n.5 (alteration in original) (emphasis omitted) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)).

Plaintiffs do not allege an official policy to abuse disabled students or to not report such abuse. Rather, the allegation is that the school system had a "policy and practice" in which Hildebrand made hiring and training recommendations for school staff and faculty and that because she was the "highest ranking official allowed and designated" by the school system, her actions and inactions "became the policy and practice" of the school system. [18-1] ¶¶ 48, 71.

Defendants contend that these allegations are vague and conclusory, fail to identify the policy or custom causing the alleged violation, and fail to establish a direct causal link between Hildebrand's authority and Sprague's actions.

Defendants also contend that any claim for a purported custom of inaction fails as well because Plaintiffs fail to allege any high-level officials were aware of the alleged abuse, as is required for such a claim. Rather, Plaintiffs' allegation is that Hildebrand

failed to timely report the alleged abuse to *any* authorities. *See D.D.T. by & through S.C. v. Rockdale Cnty. Pub. Sch.*, 580 F. Supp. 3d 1314 (N.D. Ga. 2021) (holding that complaints of abuse to principal did not satisfy requirement of showing school board officials had actual or constructive notice). The Court agrees.

Plaintiffs contend that Hildebrand's awareness suffices to impose liability on the school district under a custom of inaction theory or a final policymaker theory of liability. However, the Court is not persuaded by Plaintiffs' allegation that Hildebrand is the highest-ranking official allowed and designated by the school system. Her role is principal of a single school, giving her no authority to set policy for the school system as a whole. *See Chaney v. Fayette Cnty. Pub. Sch. Dist.*, 977 F. Supp. 2d 1308, 1319 (N.D. Ga. 2013) ("Georgia law explicitly confines control and management of a school district to the county board of education, O.C.G.A. § 20-2-50, and 'a county board is without power to delegate its authority to manage the affairs of the school district.'" (quoting *State Bd. of Educ. v. Elbert Cnty. Bd. of Educ.*, 146 S.E.2d 344, 348 (Ga. Ct. App. 1965))). Plaintiffs' citation to an Alabama case does not affect this holding of Georgia law.

Plaintiffs point to *D.D.T.* to support their argument that a principal may act as a final policymaker when her disciplinary decisions are not subject to meaningful board review. The court in *D.D.T.* cited *Holloman*, an Eleventh Circuit opinion involving an Alabama school system but nonetheless found it applicable to the Georgia system at issue. 580 F. Supp. 3d at 1338 n.13 (noting that "as a pragmatic

matter . . . superintendents typically act upon the recommendation of a principal for the specific school where the teacher is assigned."). Notably, although the plaintiff there identified the principal as having final policymaking authority, the court ultimately found that the plaintiff had failed to allege concrete facts to suggest that the principal was vested with final policymaking authority.

Even assuming *Holloman* applies in light of Georgia law, the Court reaches the same conclusion made in *D.D.T.* Although Plaintiffs allege that Hildebrand had authority to "recommend staff for hiring," "ensure that such persons, especially inexperienced special education teachers are fit for the duties they have to their students, that they remain fit throughout the school year, and to ensure that they are given the supervision and supports needed for a safe and proper educational environment," and "manage the staff, seek special education supports and other staff," [18-1] ¶ 48, they fail to allege that her decisions lacked meaningful board review.

Thus, Plaintiffs have failed to allege facts to show that school board officials had actual or constructive notice. The § 1983 claim against the school district is therefore subject to dismissal, and the proposed amended claim is futile.

C. Negligence

With respect to their state-law claim, Plaintiffs concede Defendants' position is somewhat meritorious and request additional time to allege additional facts.

However, the Court may decline to exercise supplemental jurisdiction over the state-law claim where all federal claims are dismissed. *Womack v. Carroll Cnty.*, 840 F. App'x 404, 408 (11th Cir. 2020). The Court will decline to exercise supplemental jurisdiction over the negligence claim.

IV. Conclusion

For the foregoing reasons, Defendants' motion [12] to dismiss is granted with respect to Plaintiffs' federal claims, and Plaintiffs' motion [18] to amend the same claims is denied. Plaintiffs' ADA and dueprocess claims are dismissed with prejudice, and the Court declines to exercise supplemental jurisdiction over the negligence claim. The Clerk is directed to close this case.

IT IS SO ORDERED this 16th day of November, 2022.

/s/
Timothy C. Batten, Sr.
Chief United States District Judge

APPENDIX C

TITLE II-PUBLIC SERVICES

Subtitle A-Prohibition Against Discrimination and Other Generally Applicable Provisions

SEC.101. DEFINITION. 42 USC 12131.

As used in this title:

(1) Public entity–The term "public entity" means–

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

(2) Qualified individual with a disability. – The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt. of

services or the participation in programs or activities provided by a public entity.

SEC. **102. DISCRIMINATION.** 42 USC 12132.

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

SEC. 203. ENFORCEMENT. 42 USC 12138.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

SEC. 204 REGULATIONS. 42 USC 12134.

(a) In General.– Not later than 1 year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244.

42 U.S. Code § 2000d–7 –
Civil rights remedies equalization

(a) GENERAL PROVISION

(1)
A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2)
In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) EFFECTIVE DATE

The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

29 U.S. Code § 794a –
Remedies and attorney fees

(a)

(1)
The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e–5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e–5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2)
The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section

794 of this title.

(b)
In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93–112, title V, § 505, as added Pub. L. 95–602, title I, § 120(a), Nov. 6, 1978, 92 Stat. 2982; amended Pub. L. 111–2, § 5(c)(1), Jan. 29, 2009, 123 Stat. 6.)